No. 250

Supreme Court of the United States

FRANK C. PABST and
HELEN R. PABST, - - - - - Petitioners,

versus

JOHN P. DANT DISTILLERY COMPANY,
INCORPORATED, - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

FRANK C. PABST AND
HELEN R. PABST, - - - - *Petitioners,*

v.

JOHN P. DANT DISTILLING COMPANY,
INC., - - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice of the United States and the associate Justices of the Supreme Court of the United States:

Your petitioners, Frank C. Pabst and Helen R. Pabst, respectfully submit their petition for a Writ of Certiorari to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the above-styled case, Docket No. 10594.

The proceeding was initiated by respondent, John P. Dant Distillery Company, Inc., in the United States

District Court for the Western District of Kentucky, Louisville Division, on October 24, 1945 (R. 1-41), based upon an agreement dated June 21, 1945 (R. 97-101); an amended agreement dated June 29, 1945 (R. 102-103); a supplemental agreement dated June 21, 1945 (R. 104-105), and a report dated September 21, 1945 (R. 105-106), of arbitrators appointed by the parties hereto, seeking a conveyance of certain properties on the ground that such report constituted an award under the submission. A Judgment was rendered by the District Court on September 2, 1947 (R. 118-125). From this judgment the petitioners appealed, and the Circuit Court of Appeals for the Sixth Circuit on June 2, 1948 (R. 181-182), affirmed the judgment.

The jurisdiction of this Court is invoked under the Judicial Code, as amended, Section 240 (USCA, Title 28, Section 347).

STATEMENT OF CASE.

The parties, being joint owners of certain distillery property, agreed that a sale be made by the Pabsts, petitioners herein, to the Dant Distillery Company, Inc., respondent herein, of their one-half undivided interest in said distillery at a price, designated as "fair market value," to be determined and agreed upon by arbitrators, to be selected one each by the parties (R. 97-105). The definition of the term "fair market value" to be determined by the arbitrators was given to them at the date of the submission as follows: The words "fair market value" have been

defined as the price at which one willing to sell would sell, and a person willing to buy would buy, both being familiar with all of the facts, and the seller not being forced to sell or the buyer forced to buy (R. 111). In an attempt to discharge their duties the duly appointed arbitrators, by a letter dated September 21, 1945, submitted the following report (R. 105-106):

"September 21, 1945.

"Mr. P. M. Harris
and
Mr. Oldham Clarke,
Louisville, Kentucky.

Reference: Meadow Lawn Distilling Company,
Pleasure Ridge, Kentucky.

Gentlemen:

"As per your request, and as per conversation at a meeting here between you and the signers of this report, separate and individual investigations were made into the values of the properties listed to us as being on the premises of the Meadow Lawn Distilling Company, Incorporated, and adjoining premises.

"There was handed to each of us an Exhibit A, which lists certain buildings, ground and equipment and it is upon this list that the following figures are submitted.

DESCRIPTION	Item No. 1 Replacement Value New	Item No. 2 Depreciated Sound Value
Land	$ 2,250.00	$ 2,250.00
Building	$ 50,695.00	$38,275.00
Equipment	$ 58,770.00	$35,968.00
	$111,751.00	$76,493.00

"While investigation has been made of the values of all equipment and buildings in connection with the list, yet we do not feel that we can make a report stating that each and every piece of said equipment is on the premises. It is our understanding that you have agreed that each individual piece of such equipment is now on the premises. Certain items have been changed or relocated and certain items such as some tanks being increased in size and capacity, have changed the actual conditions, but our report is on the equipment as per Exhibit A. The report is given in two items, #1, 'Replacement Value New As of Today,' and #2, 'Replacement Value Today, Less Depreciation.'

"The depreciation referred to represents a loss in comparison with new property of like kind, resultant from age, condition and remaining serviceable life.

"In connection with Exhibit A which was handed to us, we note that there are listed two trucks. We have not included the values of these trucks in the above amounts, as we do not feel qualified to establish a value on a used truck and suggest that you obtain these figures from someone versed in that business.

"Respectfully submitted,

Leslie V. Abbott,
Walter C. Wagner.

"WCW:LVA:mck"

Thereupon "Dant" contended that $38,246.50, being one-half of the smaller value listed in the report

and designated as "Item 2—Depreciated Sound Value," was the price it was required to pay for the Pabsts interest. The Pabsts refused to sell at this value on the ground that no determination of "fair market value" as set forth in the submission to arbitration had been made.

An action in the United States District Court for the Western District of Kentucky was subsequently instituted by Dant, requesting specific performance of the arbitration agreement (R. 1-41).

The United States District Court, as affirmed by the Circuit Court of Appeals for the Sixth Circuit (R. 181-182), instead of ruling upon the validity of the award went beyond the scope of the issues in arbitration and itself determined the "fair market value" of the property without any foundation in fact, or law, and found as a fact that the arbitrators intended to and did agree upon "Item 2—Sound Depreciated Value" as being the "fair market value" sought of them by the parties.

QUESTIONS PRESENTED.

The Record presents two questions:

1. Did the arbitrators, by their jointly signed report dated September 21, 1945 (R. 105-106), make a valid award in accordance with the submission?

We contend:

(1) That the arbitrators have not decided the question submitted to them.

(2) They have decided and reported what was not submitted.

(3) The award is incomplete on its face, ambiguous, and uncertain.

In Carnochan & Mitchell v. Christe, *et al.*, 24 U. S. 446, 11 Wheat. 446, 6 L. Ed. 516, the Court said in part:

> "We think the award must be set aside because it is uncertain, and not final in a very material point. * * *
>
> "The award ought to be in itself a complete adjustment of the controversies submitted to the arbitrators."

In Allen-Bradley Company v. Anderson & Nelson Distilleries Company (Ky.), 35 S. W. 1123, the Appellate Court of Kentucky said:

> "When arbitrators make an award as to matters submitted to them, and the award determines matters not submitted to them, the award as to the questions submitted will be enforced, and the award as to matters about which no question was submitted will be treated as void."

The decision of the United States Circuit Court of Appeals for the Sixth Circuit (R. 181-182), affirmed the judgment of the United States District Court for the Western District of Kentucky (R. 118-125), which ordered a conveyance of the property at a price of $38,246.50. This in effect sustained the report as an award, which is contrary to the established law of arbitration and award as evidenced by numerous decisions of this

Court and of other Federal and State Courts. The report being unresponsive to the submission, incomplete on its face, ambiguous and uncertain, did not qualify as a valid and legal award.

2. Upon the failure of the report of the arbitrators to fix the "fair market value," did the Court have the right to substitute its determination of such value and thereby bind the parties?

We contend:

(1) That the District Court had no authority to supplement the report of the arbitrators and supply the omission of "fair market value." In Carnochan & Mitchell v. Christe, 24 U. S. 446, 11 Wheat. 446, 6 L. Ed. 516, the Court said, in part:

> "It is contrary to the principle of a general reference that the Court should take the award as far as it goes, and supply all omissions by its decree."

To hold that the courts have such power is a radical departure by the District Court from the accepted and usual course of judicial proceedings, which departure has been sanctioned by the Circuit Court of Appeals and is so significant in this case and to the proper determination of the rights of the petitioners and to all parties to arbitration proceedings as to require the proper supervision of this Honorable Court to consider and limit such a departure.

Wherefore, petitioners, Frank C. Pabst and Helen R. Pabst, respectfully pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth

Circuit commanding said Court to certify and send this Court a full and complete transcript of the record and of the proceedings of the Circuit Court of Appeals had in this cause, numbered and entitled on its Docket No. 10594, Frank C. Pabst and Helen R. Pabst v. John P. Dant Distillery Company, Inc., to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court and for such relief as this Court may deem proper.

Respectfully submitted,

FRANK C. PABST,
HELEN R. PABST,
Petitioners.

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Louisville 2, Kentucky,
Of Counsel.

I hereby certify that the petition for a Writ of Certiorari in the present case is filed in good faith and not for purposes of delay.

HERBERT J. JACOBI,
966 National Press Bldg.,
Washington, D. C.,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

This brief is filed in support of the petition filed with this Honorable Court for a Writ of Certiorari addressed to the Circuit Court of Appeals for the Sixth Circuit in the above-styled case, on its Docket No. 10594.

JURISDICTION.

The Circuit Court of Appeals for the Sixth Circuit on June 2, 1948, affirmed the judgment (R. 181-182), of the United States District Court for the Western District of Kentucky dated September 2, 1947 (R. 118-125). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (USCA, Title 28, Sec. 347).

The ground upon which the petitioners invoke the jurisdiction of this Court is that the Circuit Court of Appeals for the Sixth Circuit in affirming the decision of the United States District Court for the Western District of Kentucky has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower Court as to call for an exercise of this Court's power of supervision. The decision of the District Court is contrary to decisions of this Honorable Court and to the decisions of other Federal and State Courts.

STATEMENT OF CASE.

The statement of the case in the petition for a Writ of Certiorari is hereby adopted.

QUESTIONS PRESENTED.

Two questions are presented for consideration:

1.

Did the arbitrators, by their jointly signed report dated September 21, 1945, make a valid award in accordance with the submission?

2.

Upon the failure of the report of the arbitrators to fix the "fair market value" did the Court have the right to substitute its determination of such value and thereby bind the parties?

ARGUMENT.

I.

The Jointly Signed Report of the Arbitrators Dated September 21, 1945, Being Incomplete Upon Its Face, Ambiguous and Uncertain Did Not Constitute a Valid Award in Accordance With the Submission.

It is well founded in the law that an agreement to submit to arbitrators is a contract between the parties and the scope of the submission to the arbitrators may be limited by the parties.

3 American Jurisprudence, 864.

An award which does not stay within the limits set by the parties under their contract of submission is void and if it goes beyond the assignment without deciding the question submitted it is no award. An award of arbitrators which is the result of a mistaken view of the meaning of the language in which the terms of the submission are explained is not binding.

Atchison v. Racliffe, 78 Kansas 320, 325, 96 Pac. 477.

The Court in the interpretation of an arbitration contract must give effect to the intention of the parties and in the construction of an award must consider the intent of the arbitration limited in scope by the terms of the submission. Awards generally are conclusive on all matters of law or fact consistent with the submission, but this is true only in so far as such matters are decided according to the limited construction of the contract from which the arbitrators derive their authority and not merely according to such construction as they, one or both, may choose to give it unless they are authorized by the submission to construe such language. Even then the extent of such authority under the contract is for the Court and not the arbitrators to determine.

3 American Jurisprudence, 955.

In Hobson v. McArthur's Heirs, 41 U. S. 182, 16 Pet. 182, 10 L. Ed. 930, the Court said:

"* * * If a thing be awarded to be done which is bad for uncertainty, or as being beyond the submission, or for any other objection; and

> this part of the award does not form a consideration for the performance of the matter awarded on the other part, and is distinct and independent thereof; then the award is only void for so much."

And with reference to the arbitration agreement the Court said:

> "But in construing this agreement, we must look at what was the obvious intention of the parties."

It was the lack of certainty in the report of the arbitrators dated September 21, 1945 (R. 105-106), which brought about the action in the lower Court and which is herein subject to review. The requirement of certainty in arbitration awards has been sustained by this Court in numerous decisions.

Definiteness and certainty are the indispensable and essential characteristics of an award and without them the report cannot be sustained for the reason that the petitioners would have nothing upon which they could intelligently act. If the award is inconsistent in itself and not in accord with the terms of the submission it is void.

Card v. Wallace, 7 Dana (Ky.) 190; 32 American Decisions, 85.

Davy's Exrs. v. Faw, 11 U. S. 171, 7 Cranch 171, 3 L. Ed. 305.

Lyle v. Rodgers, 18 U. S. 394, 5 Wheat. 394, 5 L. Ed. 394.

Carnochan & Mitchell v. Christe, 24 U. S. 446, 11 Wheat., 6 L. Ed. 516.

Even a casual examination of the submission agreement (R. 97-105) and of the report (R. 105-106), clearly shows that the two instruments are not related in subject matter and that the report is not responsive to the terms of the submission. Nowhere in the report is the term "fair market value" mentioned or described, yet it was this term and its determination which was the heart and substance and purpose of the submission called for in the arbitration. Neither was there an explanation in the report of the terms used so as to reconcile such terms within the definition of "fair market value" as prescribed by the parties in the submission. It was because of this patent insufficiency of the report that the petitioners, Pabsts, refused to recognize it as an award. It is clear that from an examination of the report the parties could not determine whether any of the figures used therein was the joint determination of both arbitrators of the "fair market value" of the property. There was no authority for the District Court to go outside of the report and permit a subsequent letter (R. 41, Exhibit J), which was not signed by both of the arbitrators, to explain the invalid report. Certainly if the report in and of itself failed as an award it was not within the power of one of the arbitrators to amend the report or cure any of its defects. The power of the arbitrators was exhausted when they made their report; their authority then ceased, and it was not proper to alter it thereafter.

In Bayne v. Morris, 68 U. S. 97, 1 Wall. 97, 17 L. Ed. 495, the Court said:

> "Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power, after having made an award, to alter it; the authority conferred on them is then at end."

In Brotherhood of R. & S. Cl., *et al.* v. Norfolk Southern Ry. Co., 143 Fed. 2d 1015, the Court used the following language:

> "We conclude that there was in fact no valid award made in this case. Mere decision on the part of the arbitrators, unless certified and filed as required by the agreement, constitutes no award. *When the arbitrators failed to comply with the essential terms of the agreement on which their authority—indeed, their very existence as arbitrators, was grounded—and the time passed for the filing of the award, that body became functus officio. Any attempt at making an award thereafter was null and void."* (Emphasis added.)

The petitioners respectfully submit that the report of the arbitrators was on its face, unresponsive to the submission, ambiguous and uncertain and therefore as a matter of law did not constitute an award and that the Courts below were in error in holding such report to be an award.

II.

The Parties Having Agreed to Submit Their Differences and Problems to Arbitrators, Upon the Failure of the Report to Fix the "Fair Market Value" the Court Had No Right to Substitute Its Determination For Such Value and Thereby Bind the Parties.

The law of arbitration and award has become established through the encouragement of the Courts so that today it is recognized within our public policy as an independent, speedy and agreeable method of settling disputes independent of the Courts. Although it is the purpose of arbitration to avoid unnecessary litigation, the construction or interpretation of the arbitration agreement or the determination of the validity of the award remain with the Courts. It is for the judiciary and not the arbitrators to decide whether the arbitrators have exercised their commitment as laid out to them by the parties in the language of the submission. The submission or arbitration agreement is the charter which must be utilized by the Court to measure and determine whether the arbitrators have performed the duties required of them. The fulfillment of the duties of arbitrators is predicated upon their making a report of their findings or conclusions on the matters submitted to them and if the report is definite and certain and covers the questions presented to them it will be held to be a valid award. Courts of equity have time and again refused specific performance of such contracts upon the failure of arbitration machinery.

It has been the policy of the Courts not to interfere in arbitration matters until they are consummated in a valid award. Equity will not enforce an executory contract between the parties nor will it make another contract for the parties by itself performing the duty delegated to the arbitrators. Therefore the Court should stand ready to determine whether the arbitration has been complied with, that is, determine the validity of any award and enforce it if it finds that the award is valid. The Court should otherwise decline jurisdiction in the matter and relegate the parties to their original positions in relation to their problem and thereby let the law take its course.

In the light of the foregoing principles of law there was no justification either in policy or in the pleadings for the District Court in the case at bar to determine the question of "fair market value" of the properties involved other than the main question of whether the report of the arbitrators was valid or void for uncertainty. The pleadings indicate that the plaintiff (Dant) prayed for specific performance of the arbitration agreement, or in the alternative a sale of the property, a division of the proceeds and for all other relief (R. 8-9). No request was made by either the plaintiff or the defendant for the determination by the Court of the "fair market value" of the property. The only issue of fact raised by the pleadings with reference to the "fair market value" of the property was whether or not the arbitrators agreed upon a figure which they properly determined and reported pursuant to the submission.

In Charles Bayne v. Robert F. Morris, 68 U. S. 97, 1 Wall. 97, 17 L. Ed. 495, where an award directed that the amount awarded should be secured by a bond the Court said:

> "The Court (Circuit Court of United States for the District of Maryland) did not pass on the validity of the award as it should have done, but directed the jury to find against the plaintiff."

The petitioners herein do not complain because the Court below assumed jurisdiction of this cause for the purpose of determining the validity of the report dated September 21, 1945 (R. 105-106), but it is their sincere contention that the Court in this case had no right to fix the "fair market value" of the property in utter disregard of the submission and the report, and find that the arbitrators intended "Item 2—Sound Depreciated Value" to be the "fair market value" sought by the parties. Such findings and conclusions by the lower Courts were not within the scope of the pleadings as a matter of law and were unnecessary in the proper determination of the rights of the parties.

In Carnochan & Mitchell v. Christe, 24 U. S. 446, 11 Wheat. 446, 6 L. Ed. 516, the Court said:

> "But the award ought itself to settle finally and conclusively the whole matter referred to them. It is contrary to the principle of a general reference that the Court should take the award as far as it goes and supply all omissions by its decree. The ward ought to be in itself a complete adjustment of the controversies submitted to the arbitrators."

The fact that the arbitrators could not, and did not, agree as to the value sought of them was clear and apparent in the language of the report which definitely indicates the complete disregard by them of their assignment. The Court had no right to substitute itself as an umpire or a third-party arbitrator. The arbitrators were unable to reconcile their conflicting views and therefore incorporated each of their views into the report and turned the same back to the parties. The report, being indefinite and unresponsive, left the parties in the same irreconcilable conflict which existed prior to the submission. Neither party could be bound by such a report and in view of its irregularity and the fact that both litigants had requested an order for the public sale of the property involved it was not within the province of the District Court to decide the question of "fair market value" of the property in dispute. In the absence of a valid award and in justice to both parties it was the duty of the Courts below to order the public sale as prayed by both the plaintiff and the defendant rather than to grant specific performance of an agreement which had failed without the fault of either of the parties.

Numerous decisions of the Courts hold that executory agreements to decide a controversy will not be enforced in equity. Where there is no award, or where an award is invalid, specific performance of arbitration agreements will not be decreed. Chancery will not attempt to compel a party to such an agreement to name arbitrators or consent to those named by the opposite party and will decline to authorize original

or substitute arbitration where a party fails to do so or to act in such capacity itself or through Masters in Chancery.

47 L. R. A. (N. S.) 364; L. R. A. 1917, c. 813, *et seq.*

In Red Cross Line v. Atlantic Fruit Company, 44 S. Ct. 274, 264 U. S. 109, 68 L. Ed. 582, the Court said:

> "The Federal Courts—like those of the States and of England, have both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance."

CONCLUSION.

It being clear that the report of the arbitrators did not constitute a valid award and it being equally clear based upon the prior decisions of this and numerous Federal and State Courts, that the District Court had no authority to substitute its judgment of "fair market value" upon the failure of the arbitrators to fix said value it follows that a grave injustice has been done to the petitioners herein and further that in ignoring the great body of the law as heretofore enunciated by this Court, the United States Circuit Court of Appeals for the Sixth Circuit, has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's authority of supervision.

It is respectfully submitted that the petition for Certiorari should be granted and that the Judgment herein be reversed with directions to the lower Court.

Respectfully submitted,

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CITATIONS.

Supreme Court of the United States

October Term, 1948.

No. 250.

FRANK C. PABST AND
HELEN R. PABST, HIS WIFE, - - *Petitioners,*

v.

JOHN P. DANT DISTILLERY COMPANY,
INC., - - - - - - - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

JUDGMENTS BELOW.

The findings of fact and conclusions of law of the United States District Court for the Western District of Kentucky (R. 108-118) are reported in 72 F. Supp. 619, and pursuant thereto that Court entered judgment (R. 118-125) for the respondent. The judgment of the United States Court of Appeals for the Sixth Circuit (R. 181) affirmed the judgment of the District Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 2, 1948. The petition for a writ of certiorari was filed in this Court on August 30, 1948. Jurisdiction of this Court is invoked under Section 240 of the Judicial code of the United States, as amended (28 U. S. C., §347).

STATEMENT.

The respondent, John P. Dant Distillery Company, Incorporated (hereinafter called "Dant"), instituted this action against the petitioners, Frank C. Pabst and Helen R. Pabst, his wife (hereinafter referred to in the singular as "Pabst"), to secure specific performance of an agreement to sell, at a price fixed by appraisers, an undivided one-half interest in a jointly owned warehouse and certain distillery equipment.

The issue as to whether the appraisers by their award fixed the value of the property in accordance with the terms of the arbitration agreement was tried before the District Judge. He found from the language of the award and from the evidence, that the appraisers fixed $38,246.50 as the sale price in conformity with the terms of the arbitration agreement (R. 115), and entered a judgment (R. 118) requiring Pabst to convey to Dant the property involved in this action, for the sum of $38,246.50 in compliance with the award under the arbitration agreement.

Pabst prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit and that Court entered a judgment (R. 181) which reads as follows:

> "The above case having come on to be heard upon the transcript of the record, the briefs of counsel, and arguments in open court; and it appearing that appellee and appellants are jointly the owners of certain land and a warehouse situated thereon; that appellee is in possession under a lease which gave it the right to purchase the property at its fair market value; that the parties entered into an agreement that the fair market value of such property was to be fixed by appraisers designated by the parties; *that the appraisers made their report and fixed the value for the property to be purchased by appellee and sold by appellants;* that appellants refused to sell on the ground that the appraisers had not, in fact, determined the fair market value of the property; *and it appearing that the district court found, as a fact, that the appraisers had determined and reported the fair market value,* and entered conclusions of law that appellee was entitled to a conveyance of the property and that appellants had no right to receive rent after tender of the consideration or offer by appellee to pay the value of the property as fixed by the appraisers; and the district court having entered a judgment in favor of appellee, in conformity with such findings and conclusions; and it appearing that the findings of fact of the district court are sustained by the evidence and there is no error in its conclusions of law.

"Now, therefore, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and is hereby affirmed."
(Emphasis added.)

Pabst applies for certiorari on the ground that the Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

SUMMARY OF ARGUMENT.

1. The decisions below are correct and there is no occasion for further review.

2. This is not a case for review by certiorari under Rule 38, §5(b), of the Rules of this Court.

ARGUMENT.

I.

The Decisions Below Are Correct.

Counsel for Pabst contend that the Court of Appeals erred in deciding "that the findings of fact of the District Court are sustained by the evidence and there is no error in its conclusions of law." Counsel seem to urge that neither the District Court nor the Court of Appeals found from the evidence that the appraisers made an award, but in this they are in error. As pointed out above, both courts expressly found that an award had been made under the terms of the arbitration agreement.

The finding of fact, that the appraisers by their award fixed $38,246.50 as the sale price in conformity with the terms of the agreement, is supported by the language of the award, and by the only clear and convincing testimony as to what was intended by the language of the award. The conclusion that Dant was entitled to a conveyance of the property, follows as a matter of course from the findings of fact, since no question has been raised as to the validity of Pabst's agreement to sell at a price fixed by the appraisers.

We submit that the finding of fact is correct and there is no occasion for further review.

II.

This Is Not a Proper Case for Certiorari.

While there is no error of fact or law in the decisions of either court below, even if there were such error, it is apparent from the petition for a writ of certiorari that the questions presented relate to a particular contract and turn upon the facts of this case, and there is no controversy of importance with respect to legal principles. In short the petitioners ask this Court to review only a question of fact found by the District Court and affirmed by the Court of Appeals.

In *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 67 L. Ed. 922, 43 S. Ct. 531, the Court said:

> "The jurisdiction to bring up cases by certiorari from the circuit court of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits;

> and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Clearly this case does not involve "questions of importance which it is in the public interest to have decided by this Court of last resort," and the question presented is not one of those enumerated in Rule 38, Paragraph 5(b) of the Rules of this Court.

As said in 48 Harvard Law Review 238, 274:

> "To scores of petitioners each year any asserted error in the decision of a case, however minute and of whatever character, is such a departure 'from the accepted and usual course of judicial proceedings' as to call for an exercise of the Supreme Court's power of supervision. Of course, the reason refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the judicial process."

It is obvious that the petition in this case does not present any question of major concern to the integrity of the judicial process.

Therefore this is not a proper case for the issuance of a writ of certiorari.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

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